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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 688

THE BORDEN COMPANY,

Petitioner,

against

JOSEPH BORELLA, CHARLES J. BURKE, WALTER CROSS, WILLIAM L. DEGRAAF, JOHN B. DONEGAN, STANLEY GAJDA, EDWARD GRAMCKO, STANLEY GRZECK, OLE HOFSETH, WILLIAM KAY, ALEXANDER KRUPICA, WILLIAM LENDO, THOMAS LO SASSO, ROBERT A. MARSHALL, WALTER C. MENYHART, JAMES MCCARTHY, MICHAEL NOVEMBER, LEONARD B. QUINN, ANDREW RUEB, THOMAS M. TREACY and JESUS ECHEVARRIA,

Respondents.

BRIEF FOR RESPONDENTS

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Criticism of Petitioner's Statement of Case	4
Summary Criticism of Petitioner's Argument	5
Summary of Respondents' Argument	6
Statement	6
Argument	30
Introduction	30
POINT I—Respondents were "engaged in the production of goods for commerce" within the meaning of the Act	32
A. Respondents' activities constituted production of goods for commerce, if the occupants of the Borden Building were engaged in production of goods for commerce, in the Borden Building, within the meaning of the Act	32
B. The occupants of the Borden Building were "engaged in the production of goods for commerce", in said building, within the meaning of the Act	40
POINT II—Plaintiffs were "engaged in interstate commerce" within the meaning of the Act	46
CONCLUSION	47

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BRIEF FOR RESPONDENTS

Opinions Below

The opinion of the District Court (R. 102-106) is reported in 52 F. Supp. 952.

The majority and dissenting opinions of the Circuit Court of Appeals, Second Circuit (R. 128-132) are reported in 145 F. (2d) 63.

Jurisdiction

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this Court by Judicial Code, Section 240, as amended (Act of March 3, 1891, c. 517, Sec.

6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; U. S. C. Title 28, Sec. 347).

Judgment of the Circuit Court of Appeals for the Second Circuit which is sought to be reviewed was filed on August 18, 1944 (R. 133). The petition for a writ of certiorari was filed herein on November 16, 1944. The order of this Court granting certiorari was filed January 2, 1945 (R. 134).

Questions Presented

The primary question presented is whether the respondents were "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938 (52 Stat. 1060, June 25, 1938, 29 U. S. C. Secs. 201-219).

The answer to this primary question depends on the further question of whether the particular activities of the Borden Company in the Borden Building constituted "production" of goods for commerce within the meaning of said act.

The Statute Involved

The original statute, before being incorporated into the United States Code was the Act of June 25, 1938, c. 676, 52 Stat. 1060. The sections in the original Act were Sections 1 to 19, inclusive. In the Code, two hundred numbers were added to each section number, so that the section numbers in the Code run from 201 to 219, inclusive.

For purposes of brevity we shall, hereinafter, refer to the Fair Labor Standards Act of 1938 as the "Act", or the "statute".

Section 207—Maximum Hours:

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date.

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 203—Definitions:

"As used in sections 201-219 of this title—

• • • • • • •

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

• • • • • • •

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles *or subjects* of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof." (Italics ours.)

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or *in any process or occupation necessary to the production thereof*, in any State." (Italics ours.)

Section 216—Penalties; Civil and Criminal Liability:

"(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Criticism of Petitioner's Statement of Case

At pages 2 to 4 of its brief petitioner sets forth its "Statement of Case". There are several assertions therein to which we take exception.

In the second sentence in the third full paragraph on page 2, petitioner attempts to summarize the theory underlying the ruling of the Circuit Court of Appeals in the case at bar. Petitioner asserts that such theory was that "the respondents had no relationship or tie with the actual production of goods." As we shall later show, this assertion is plainly wrong.

Petitioner also asserts that such theory was based on the production by the Borden Company "in distant places" and not in the Borden Building. As we shall later show, this assertion is plainly wrong. The Court below held that the activities of the Borden Company in the Borden Building constituted "production of goods for commerce" within the meaning of the Act.

In the second full paragraph on page 3 petitioner asserts that the activities carried on by the Borden Company in

the Borden Building do not constitute "production". Such assertion begs the very question involved in the case at bar.

In the last paragraph on page 3 petitioner refers to finding of fact 9 (R. 118) which states that the petitioner "directs, supervises, manages and controls its entire business through the aforesaid directors, officers and employees", and in the third paragraph on page 4 petitioner asserts that the "Circuit Court of Appeals accepted and adopted the facts as found by the Trial Judge." It is true that the Circuit Court of Appeals did say: "The facts, which are not in dispute, are sufficiently stated in the findings of the trial judge." (R. 128). However, the adoption by the Circuit Court of Appeals of finding 9 should not be construed to mean that the Circuit Court of Appeals treated the case at bar as the case of an ordinary home office building having only a general remote supervision over the activities at its factories. The Circuit Court of Appeals had all the detailed facts before it, and stated in its opinion (R. 128,129):

> "The manufacturing all takes place in factories in the United States and Canada, which it owns and operates; but its executive and administrative activities —the supervision, management and control of the entire business—are all centered in an office building in New York, * * *. * * * This is the spot from which all directions go out as to what shall be bought, what shall be manufactured, where the products shall be distributed, etc."

The brief of the petitioner is wholly inadequate in failing to set forth the activities of the occupants of the Borden Building.

Summary Criticism of Petitioner's Argument

Petitioner has misconceived the issue in this case. It urges that the Court below erred in interpreting the word "necessary" in the Act, and gives a number of reasons, all

of which are without merit, why the word "necessary" should be given a restricted meaning sufficient to bar respondents from recovery. For a full criticism of petitioner's arguments see pages 34 to 40 herein. We think that the meaning of the word "necessary", as applied to service and maintenance men in a building, has been settled by this Court in its prior decisions. In our view, the real crux of this case is whether the activities of the Borden Company in the Borden Building constituted "production of goods for commerce" within the meaning of the Act.

Summary of Respondents' Argument

Respondents were engaged in the production of goods for commerce within the meaning of the Act. They are "necessary" to production because they contribute to continuity of production in the Borden Building by making the building safe, clean and habitable. The activities of the occupants of the Borden Building constituted "production of goods for commerce". "Production" means "handled" or "worked on". "Goods" has a two-fold meaning, viz., tangible objects such as cheese, etc., and the physical expression of intangible ideas. Under each of such meanings "goods" were "produced for commerce" in the Borden Building.

Respondents were also "engaged in interstate commerce" within the meaning of the Act.

Statement

This case involves the scope of the Fair Labor Standards Act of 1938 (U. S. Code, Title 29, Chap. 8, Secs. 201-219) in relation to a particular phase of industrial activity. Under Section 207(a) an employer must pay overtime compensation to any of his employees who is "engaged in commerce or in the production of goods for commerce". Section 203(j) provides that "for the purposes of this chapter

an employee shall be deemed to have been engaged in the production of goods if such employee was employed * * * in any process or occupation necessary to the production thereof * * *".

The employees here are engaged as service and maintenance men in a building in New York City called the Borden Building. The activities carried on in such building will be described in detail hereinbelow.

Section 216(b) makes an employer who violates the provisions of Section 207 liable to the employees affected in the amount of their unpaid overtime compensation and in an additional equal amount as liquidated damages, permits employees to maintain an action to recover such liability and directs the court in such action, in addition to any judgment awarded to the plaintiffs, to allow a reasonable attorney's fee to be paid by the defendant.

The precise question before the Court below was whether the Act extended to such service and maintenance employees in the Borden Building.

The Borden Company occupies seventeen floors, in whole or in part, of the Borden Building, located at 350 Madison Avenue, New York City, which has twenty-four floors, and which is owned by it. *From the offices in said building, an elaborate system of interstate production is controlled and given its operating force.* This particular system is such that without the activities carried on in its offices in the Borden Building, the Company's manufacturing plants located in various states in the country (R. 13) could not operate, any more than they could without their plant machinery or plant superintendents. These particular activities in the Borden Building constitute a vital element in the Borden Company's interstate production system. The details of the peculiar and unique manufacturing set-up of this Company are set forth hereinbelow.

This case presents facts clearly different from those present in the ordinary case of corporate home office supervision.

Nature of Respondents' Activities

The respondents are service and maintenance employees in the Borden Building, and are employed by the petitioner in connection with its operation and maintenance of said building. Some of the respondents are porters, some are watchmen, and others are elevator men (Finding 7, R. 118).

The respondents performed work ordinarily done by porters, watchmen and elevator men in such a building. The details of their work are set forth in the deposition of Marshall (R. 83-97). The porters clean lavatories, corridors, stairways and other places in the building, and have a few incidental duties, such as moving furniture, packing waste paper, distributing towels, etc. The night watchmen protect the building and its contents from fire and theft by making the rounds of the building and punching "Watchmen's keys" distributed in seventy-four stations throughout the building. They also require night visitors to the building to sign a register. The elevator men run the eight elevators in the building. The elevators are used by all the occupants of the building.

In short, the respondents contribute and are essential to making the Borden Building safe, clean and habitable for the use of its occupants.

The Building and Its Occupants

The building is a twenty-four story office building at No. 350 Madison Avenue in the City, County and State of New York, and is owned by the petitioner (Finding 6, R. 117). The total rentable area of the building is about 198,018 square feet (R. 101). During the period in question the Borden Company occupied 115,710 square feet (R. 101), which constitutes about 58% of the total rentable area. The space used by the Borden Company takes up in whole or in part approximately seventeen of the twenty-four floors, and the building is the home office of the company (Finding 8, R. 118). The remainder of said building not occupied by the Borden Company is occupied

pursuant to written agreements of lease by various persons, firms, partnerships, associations and corporations (Finding 17, R. 119), and none of said tenants produce, manufacture, handle, process or in any other manner work on any goods in said building (Finding 18, R. 120). We shall therefore limit our discussion to the activities of the Borden Company in the building.

Some General Facts About the Borden Company

The Company is a New Jersey corporation (Finding 1, R. 117). It is licensed to do business and is doing business in the State of New York and in the Southern District of New York (Finding 2, R. 117).

The Company is engaged in the business of processing, manufacturing, selling and distributing fluid, condensed, evaporated milk, casein, ice cream, butter, cheese and various other products (Finding 3, R. 117). It also manufactures various other products. During the period in question its gross sales exceeded $200,000,000 per year (R. 100). *It does business throughout the United States and in foreign countries* (Finding 4, R. 117). *The company owns and operates plants and factories in the United States and Canada* where it processes, manufactures, and from which it sells and distributes its products (Finding 5, R. 117; R. 13) across state lines.

The Activities of the Borden Company in the Borden Building

There are 822 employees of the Borden Company working in the Borden Building (R. 98). We shall analyze their activities in some detail, in most cases dealing only with large groups. We regret having to burden the Court with such detail, but it is unavoidable, since, in our view of the law, each case of this kind must be decided on its own facts, and the issues raised by this case cannot be properly analyzed without a scrutiny of the facts.

The Borden organization includes "General Departments", "Divisions", "Departments", "Bureaus", etc. There is a distinction between general departments relating to the company as a whole, and departments which are connected merely with divisions (R. 51-52).

The following is an organizational chart of the activities of the Borden Company in the Borden Building (the page numbers within the parentheses indicating the page numbers of this brief where the activities are discussed):

Board of Directors (11)
Executive Officers (11)
Manufacturing Department (13)
Purchasing Department (14)
General Accounting Department (15)
General Advertising Department (15)
Legal Department (16)
Income Tax Department (16)
Bureau of Insurance (16)
Public Relations Department (17)

The Various "Divisions" of the Company:

—Manufactured Products Division (17)
  —Sales Department (18)
  —Credit Department (19)
  —Cashier's Department (20)
  —Accounting Department (20)
  —Controller (20)
  —Disbursing (21)
  —Bank Reconciliation (21)
  —Cost Accounting (21)
  —Stock (22)
  —Sales Tabulation (22)
—Casein Division (22)
—National Milk Sugar Division (24)
—Special Products Division (24)
—Cheese Division (25)
—Ice Cream Operation (25)
—Fluid Milk Operation (25)

Departments Covering Several Divisions:
—Label Department (25)
—Export Department (26)
—Real Estate Department (26)
—Safety Bureau (27)
—Payroll Tabulation Department (27)
—Central Transcribing Bureau (27)
—Telephone and Switchboard (27)
—Traffic Department (28)
—Stationery Department (28)
—Mailing Department (29)
—Photostat and Photo-offset Department (29)
—Experimental Kitchen (30)

We shall now discuss the activities of these various groups of persons.

Board of Directors

The Board of Directors of the Borden Company consists of eleven members. They hold their meetings on the eleventh floor of the Borden Building. They guide the general policy of the Company (R. 63).

Executive Officers

The executive offices of the company are located on the eleventh floor of the Borden Building. The officers consist of a president (Mr. Montague), an executive vice-president (Mr. Waugh), several vice-presidents (Messrs. Ramsdell, Callan, Kieser, Jones, Comfort, Ross), a treasurer (Mr. Noetzel), a secretary (Mr. Rebman), an assistant treasurer and an assistant secretary (R. 61-68).

The president formulates policies for the operation of the company. He consults with the vice-presidents in charge of particular operations and issues instructions to them as to methods of running and operating the plants and factories. He does not issue instructions directly to the various plants and factories of the company (R. 61).

The executive vice-president is a liaison executive between the president and the other vice-presidents. He

works in cooperation with them and makes decisions, subject to the approval of the president, on the following subjects: accounting policy; expansion with respect to new buildings, new products and new affiliates; discontinuance of old factories, etc. (R. 62).

The vice-presidents (R. 62-66) are each in charge of specific operations of the company. In general they decide on new methods of production, new machinery for production, labor saving devices, etc. (R. 62-63). Mr. Ramsdell is in charge of the Sales Department of the Manufactured Products Division. Mr. Callan is in charge of the Casein Division and of the National Milk Sugar Division. Mr. Kieser is in charge of the Special Products Division. We shall discuss the activities of Messrs. Ramsdell, Callan and Kieser in greater detail hereinbelow. Mr. Jones is in charge of ice cream operations. Mr. Comfort is in charge of fluid milk operations. Dr. Ross is the economic analyst for the company. He forecasts business trends affecting inventories of stocks and raw materials, purchases; production and sales, and makes recommendations to vice-presidents in charge of specific operations concerning increases or decreases of supplies and inventories.

The treasurer (R. 66-67) controls the financial activities of the company. He supervises its cash position, negotiates and consummates loans for the company to be used for expansion of equipment and production in its plants and factories. He also supervises the Accounting Department, the Credit Department, the Bureau of Insurance and the Safety Bureau.

The secretary (R. 67) keeps all the corporate records, attends at and prepares minutes for directors' meetings, takes care of issuance of stock of subsidiary corporations, affixes the corporate seal and attests many documents which are thereafter sent across state lines.

The assistant secretary and assistant treasurer (R. 68) help the secretary and treasurer in the performance of their duties. The treasurer also has various subordinates to help him (R. 68).

The Manufacturing Department

This Department (R. 43-47) occupies the entire seventh floor of the building. It controls the superintendents of the various factories throughout the United States. It supervises the instructions for running the plants which manufacture all products of the Borden Company except casein and milk sugar. It receives advice daily from the various factories as to the pounds of milk received. If the supply of milk is inadequate for economical operation, this department will issue instructions to some other factory to divert their milk to the plant, or will change running instructions of the plant from either condensed to evaporated or some other manufactured product which the plant is qualified to run. It instructs the various factories as to when they should decrease production, and when they should change the form of production. It receives requests from superintendents of the individual plants and factories for instructions in connection with equipment, repairs, labor problems, purchase of trucks and automobiles. It determines new methods of manufacture and sends instructions to all the factories to use such new methods. It sends instructions throughout the United States. It controls the supply of raw materials for each plant. It controls the size, quantity and production of tin receptacles for Borden products, and is in charge of tin shops and machine shops where the Company makes tin cans. It appoints the top manufacturing personnel for the various plants. It receives audits from the individual factory superintendents as to their requirements, and sets up budgets for such factories. It approves the letting of contracts for various business matters that arise in connection with the operation of such plants. It makes contracts for the purchase of heavy plant expansion, issues orders for the construction of increased facilities, arranges the financing of plant expansion, and pays the bills for heavy equipment contracted for. Such intimate and instantaneous control of plant operations all over the United States from a building in New York City might almost seem to be im-

possible. It is true that this department does have two efficiency engineers who travel to and inspect the plants, and report to this department. It is also true that long distance telephone facilities are available (R. 26). But the real explanation is that this department has a *teletype machine with direct wires from the Borden Building to the various factories all over the nation* (R. 26). As Mr. Wyman admitted (R. 44) the manufacturing department in the Borden Building is the "*pulse* of the supply and demand condition of the individual factories and plants of the Borden Company, throughout the United States". The pulsations of the production ideas created and worked on in the Borden Building flow instantaneously over the teletype wires. The factories make products for shipment across state lines, and these products are sent across state lines as a result of the direction and control exercised by the manufacturing department in the Borden Building (R. 44). In effect, there is a regular system of interstate production.

Purchasing Department

The Purchasing Department (R. 69-71) occupies the entire thirteenth floor of the Borden Building and is in charge of Mr. Morse. The various factories communicate their needs to the vice-president in charge of each operation, and he advises the purchasing department of such needs. Representatives of this department also visit the factories to determine their requirements. This department purchases the needed supplies from visiting salesmen. It also negotiates and makes contracts for the purchase of the needed articles. It purchases substantially all the major supplies, machinery and raw materials needed by the plants and factories for the production of goods. Among the articles it purchases are sugar, coal, tinplate, labels, fibre boxes, wooden boxes, coffee, cleaning powder, heavy machinery, cocoa, malt, liquor, bottles, bottle caps, ice cream cartons, and barrels. These purchases cross state lines and are used to produce goods for shipment across state lines.

General Accounting Department

The General Accounting Department (R. 58-59, 66, 68) on the sixteenth floor is in charge of the general controller of the company, Mr. Camp. He supervises the general accounting procedure of the company, its affiliates and divisions. He prepares letters of instruction as to accounting procedure affecting operating units and sends such letters to regional accounting representatives of the company. He compiles statistics and consolidated financial statements of the Borden Company, its divisions and affiliates. He also compiles property records. The material prepared by him is photostated in the building and regularly sent across state lines, either directly from the building or from the office of agents of the company. The information contained in such photostats is for the use of the executives or the stockholders of the corporation.

General Advertising Department

The General Advertising Department, on the sixteenth floor (R. 76-77), is in charge of Mr. Peabody. It handles general and institutional advertising to build up good will for the company. Other advertising material is prepared by Mr. Ramsdell in the Sales Department in the Manufactured Products Division, on the fifth floor, and Messrs. Peabody and Ramsdell often work in conjunction, particularly in preparing customer's display material in connection with the basic Borden advertising "Elsie The Cow". Mr. Peabody and his assistants in the building create the ideas and reduce them to rough drafts. The final drafts are either prepared in the building, or prepared by an outside independent advertising agency and finally approved in the building. The final draft is then sent to an outside printer for proof. The proof is later approved by Mr. Peabody who then issues instructions to the printer to transmit the prints to the publications for insertion. The Borden Company inserts such good will advertising in national publications, such as Saturday Evening Post, Liberty and

Colliers (R. 34). The advertisements contemplate shipments across state lines from the company's factories and plants, wherever they may be situated (R. 28).

The General Advertising Department also handles the advertising for fluid milk (R. 64).

The Legal Department

The Legal Department (R. 36-37), on the fifth floor, is a part of the Borden Company, and its employees are employees of the company. It also has outside general counsel.

The Legal Department has three branches—general, handling general matters; workmen's compensation, handling all workmen's compensation cases for the company and its affiliates; and public liability.

The factories and plants of the company all over the country write in to this department for advice on such matters. The department prepares opinions with respect to national and state questions and sends the opinions across state lines over the whole nation.

The Income Tax Department

The Income Tax Department (R. 51-53) on the ninth floor prepares and files federal, state, dominion and provincial income tax returns for the Borden Company as a whole. The returns and the payments of taxes shown thereon are sent across state lines to the various tax collectors.

The Bureau of Insurance

The Bureau of Insurance (R. 77-78) on the sixteenth floor is under the direction of the treasurer (R. 66) and places all types of insurance for the Borden Company. In some instances, such as fire insurance for the factories and their contents, the Borden Company is a self-insurer and this Bureau deposits security in various states to comply with state laws. The Bureau insures raw products, purchased for factories, in outlying locations, and finished

products at various locations. It also places war risk insurance, and marine insurance for its Pacific fleet.

It also attempts to reduce insurance premium rates by installing safety devices at the factories of the company. For this purpose the Bureau has engineers who make surveys of the various plants and factories producing goods for interstate commerce and make recommendations for improvements in those factories. In this work it cooperates with the Safety Bureau on the fourteenth floor.

The Public Relations Department

The Public Relations Department (R. 73-74) on the fourteenth floor is under Mr. Fairman, as director of public relations for the company. This department has charge of public relations all over the country.

The "Divisions" of the Company

In addition to the above departments covering the company as a whole, there are several operating "Divisions" in the Borden Building which are related to specific production activities and which are divided into various departments. These departments of a division should not be confused with the departments of the company as a whole. We now discuss the various divisions and their departments. We shall later discuss departments which do work for several divisions, but which are not departments of the company as a whole.

The Manufactured Products Division

The Manufactured Products Division is located on several floors, and has charge of all manufactured products except casein and milk sugar (R. 43), which have their own Divisions.

The Manufactured Products Division has several departments and sub-departments. We have already discussed its Manufacturing Department.

The Sales Department

The Sales Department of the Manufactured Products Division (R. 27-32; 34-36), occupies all of the fourth floor and part of the fifth floor of the Borden Building. This department is headed by Mr. Ramsdell. It has charge of the sales promotion of all manufactured products of the Company, except casein and milk sugar (which have their own separate "Divisions"). The products it supervises have been given an organization name of "full line products" (R. 28). Among such products are condensed milk, evaporated milk, malted milk, Hemo, caramels and mincemeat (R. 27). It also promotes the sale of new products (R. 29).

Sales are promoted through the use of advertising and the use of district salesmen.

Mr. Ramsdell decides upon the type of campaign to be pursued (R. 29).

We shall first discuss promotion through advertising. Advertising is prepared for condensed milk, evaporated milk, malted milk, milk sugar and mincemeat (R. 27). Mr. Ramsdell works up the advertising expenditure budget (R. 28). The advertising ideas are created and reduced to rough layouts by Mr. Ramsdell and his staff (R. 27, 28, 29, 34). The layouts are then sent to independent advertising agencies (R. 28), then to commercial artists, then, at Mr. Ramsdell's instructions (R. 36), to the printer and finally are sent to the publication for insertion. The general advertising, under instructions from Mr. Ramsdell (R. 35), goes to national magazines and periodicals such as the Saturday Evening Post, Liberty and Colliers magazines (R. 34). The advertisements cross state lines and are distributed on a nationwide basis (R. 34). In addition Mr. Ramsdell and his staff create ideas and prepare layouts for brochures, window displays, window strips and counter displays to be used in groceries and super markets throughout the United States (R. 34). Such layouts go to an independent advertising agency, then to commercial artists, then to the printer. The prints are distributed across state

lines under Mr. Ramsdell's instructions. In some instances this department furnishes material to local store owners so that they may prepare and insert the ads in local newspapers, pay for them, and receive a credit from the Borden Company (R. 35). In district campaigns this department sent advertising material to the district office of the Company. All of such advertisements contemplate shipments across state lines from the various factories and plants (R. 28), to wholesalers all over the United States (R. 27).

Sales are also promoted by the use of a national sales organization (R. 29) consisting of district sales managers and salesmen. This department directs the activities of this sales organization (R. 27, 29). It supervises the number of salesmen in a given district, approves increases and decreases of the number of salesmen in a given district, and supervises and controls the district manager, who in turn controls the district salesmen. Local sales contemplate regular shipments of products across state lines (R. 30).

Orders resulting from such sales promotion are received by this department (R. 27), which prepares invoices and sends them to the various factories (R. 22, 27). The factories then make shipments to the customers across state lines (R. 28, 31, 32). The handling of cheese orders is slightly different (R. 32).

Credit Department

The Credit Department (R. 39-40) of the Manufactured Products Division is in charge of Mr. Cranch and occupies part of the sixth floor. It receives requests for reports on credit of prospective customers from the Sales Department and from Borden representatives and brokers all over the country. It keeps records of accounts receivable and consults other credit information in its office. It prepares credit reports in answer to such requests and forwards such reports across state lines all over the country. No sale on credit by the Borden Company can be made anywhere in the country unless approved by this department.

Cashier's Department

The Cashier's Department (R. 37-39) of the Manufactured Products Division occupies part of the sixth floor and is in charge of Mr. Turner. The bills sent to customers, in practically all cases, call for payment at the Borden Building. The customers of the Manufactured Products Division send checks, money orders and drafts to the Borden Building, and the payments find their way to this department. A great many of such payments are sent across state lines pursuant to sales made across state lines.

Accounting Department

The Accounting Department (R. 13-14; 45; 53-55) of the Manufactured Products Division occupies the eighth, ninth and part of the tenth floors of the building, and is in charge of Mr. Wyman who has the title of Controller.

The controller of this department supervises this entire department. His office issues all accounting instructions to various plants and factories of the defendant throughout the United States with respect to reporting to the home office at 350 Madison Avenue as to

(a) production figures, disbursements, receipts and shipment of goods from plants and factories,

(b) instructions pertaining to deductions of social security and state unemployment insurance, taxes and the proper method of so reporting on payroll records (R. 13).

The controller's office establishes and perfects financial statements with respect to the recording of sales, costs of sales, deductions, selling and administration expenses to arrive at net profits (R. 14). It supervises a staff of traveling auditors who visit each plant and factory for the purpose of internal control (R. 14). It supervises personnel matters in connection with factory and subsidiary employees (R. 14). The controller visits the defendant's

plants and factories from an administrative standpoint and establishes accounting procedure (R. 54-55). He directs, supervises and controls said plants and factories from an accounting view. He offers suggestions as to the increase and decrease of personnel, and sometimes employs personnel. He also instructs the superintendents of defendant's plants and factories as to methods of procedure developed at the home office for reports to the home office so that there is a systematic running of the Manufactured Products Division from the home office at 350 Madison Avenue (R. 55). Accounting reports prepared in the Borden Building are sent across state lines to plants outside of the state (R. 54). His department acts as a control system of all the plants and factories of this division throughout the country (R. 50).

There are five sub-departments of the Accounting Department of the Manufactured Products Division: Disbursing, Bank Reconciliation, Cost Accounting, Stock and Sales Tabulation. The disbursing sub-department (R. 49-50) is located on the eighth floor. It pays all bills and invoices. It pays brokers' commissions and makes payments on contracts. It also keeps track of and distributes factory disbursements. It checks to see whether factories have received purchases before paying the bills. It covers all the factories and plants of the Manufactured Products Division throughout the nation.

The Bank Reconciliation sub-department (R. 47-48) is located on the eighth floor. It covers the bank accounts of the plants all over the country. The local banks send duplicate bank statements to the superintendents of the various factories. The superintendent retains the duplicate but forwards the original bank statement and the vouchers to this sub-department which checks them for errors.

The Cost Accounting sub-department (R. 48-49) is located on the eighth floor of the building. It devises and applies methods of cost accounting to arrive at the individual factory cost of individual manufactured products.

The factories send in the figures of expenditures, and this sub-department collects and analyzes them. Its computations are sometimes used by the Manufactured Products Division as a basis for stopping production, increasing production, or changing the methods of production. The computations are also used by the General Accounting Department in preparing a profit and loss statement for the Borden Company. This sub-department also makes estimates of cost of production of proposed new products. It also does similar work for the Cheese Division (R. 48). It keeps records of raw materials and supplies (R. 51).

The Stock sub-department (R. 50-51) is located on the ninth floor of the building. Its records cover finished goods only. It works in conjunction with the Sales Tabulation sub-department. It keeps a perpetual running inventory of finished goods for every plant and factory. It receives semi-monthly and monthly reports of factory production all over the United States. It adds production and subtracts sales from the running inventory and arrives at an inventory at the end of the outlay. The inventory figures are turned over to the Cost sub-department for use in its computations.

The Sales Tabulation sub-department (R. 51) is located on the ninth floor. Its function is to tabulate all sales made to customers. Its computations are used by the Stock sub-department in computing the running inventory, and also to check Accounts Receivable from Sales.

We have completed our discussion of the Manufactured Products Division and now turn to the other divisions of the Company, to wit: Casein, National Milk Sugar, Special Products, Cheese, Ice Cream, and Fluid Milk.

The Casein Division

The Casein Division (R. 16-21) is on the second and third floors of the building. It handles the manufacture, sales promotion, and collections for casein products. It is in charge of Mr. Callan.

Casein is a plastic product made from skim milk powder. Casein is used to make a glue used in the manufacture of plywood and in the repair of household furniture. Casein is also used to make buttons, combs, hair brush backs, toothbrush holders and handles (R. 17).

The Casein Division has factories and sales offices at Bainbridge, New York, and Seattle, Washington. The main office, however, is in New York (R. 19).

The New York office purchases raw materials for the factories (R. 20) and sends them manufacturing instructions. It allocates orders from purchasers to the factories.

Sales of casein are promoted by advertising and by salesmen. The advertising copy is drafted in the building by Mr. Callan. The draft is sent to an independent advertising agency which writes the final copy. The advertising is placed from the building and is inserted in the Saturday Evening Post, Popular Mechanics, other national periodicals and trade publications. The advertising recommends the use of Casco cement or glue for various specific purposes and invites readers to communicate with the Casein Company in the Borden Building to get a sample. This Division also prepares special advertising circulars, booklets and brochures about casein and its uses, which are mailed out by the Mailing Department hereinafter discussed. Letters, in response to the advertisements, requesting samples, are received at the ~~home office in~~ the building. That office prepares order forms for samples in duplicate, listing the names of the prospective customers. The duplicate order forms for samples are sent to one of the two factories above described. The factory ships the sample to the prospective customer, usually by parcel post, and returns the original order to the Borden Building office with a notation that the samples have been shipped. Salesmen operate out of the Borden Building and the two branch sales offices to secure contracts to purchase casein products. The home office sends instructions regarding price policy to the branch sales offices.

This division passes on the credit standing of its new customers (R. 20).

After a factory ships goods to customers, it informs the home office which then sends out bills. Payments are made directly to the Borden Building (R. 23). The Seattle office however, sends out its own bills.

Shipments from the casein factories go across state lines (R. 21) and the casein products are distributed on a nation-wide basis (R. 20).

National Milk Sugar Division

The National Milk Sugar Division (R. 23) is on the third floor of the building, and is also in charge of Mr. Callan. It has factories at Penalville and Bainbridge, New York. These factories take the sugar out of skim milk, and make lactose which is used for feeding infants. The activities of this Division are similar to those of the Casein Division, except for differences arising out of dissimilarity of products.

This Division in the building issues instructions to the factories with respect to production, procedure, distribution and other matters. This home office takes care of advertising and receives orders as a result of advertising. Its customers are middlemen such as druggists. It sends instructions to the factories to ship products across state lines. The factories ship the goods, and advise the home office which sends bills to the customers. Customers send payment to the home office.

The Special Products Division

The Special Products Division (R. 74-76) is on the fifteenth floor of the building, and is in charge of Mr. Kieser. Its factories manufacture animal foods, live stock foods, poultry food, vitamins, flavors, concentrates, fish livers, fish meal and other fish products. It has charge of the manufacture and sales promotion and functions like the Casein Division. It purchases raw materials for the factories in

conjunction with the Purchasing Department. It supervises and directs the manufacturing operations of the plants. It has its own advertising staff which functions like that of the Casein Division. It has salesmen and all sales made by them are subject to this Division. It manufactures for shipment across state lines, and the manufactured products do cross state lines. It has a direct *teletype* wire to all plants and factories throughout the nation (R. 26).

The Cheese Division

The Cheese Division (R. 32) is under the control of Mr. Echburg, who is the general sales manager of the Division. He has a staff in the building. Its sales activities are the same as the Manufactured Products Division except that it has no separate advertising activities.

Ice Cream Operations

The Ice Cream Operations (R. 63-64) do not have a separate Division, but are in charge of Mr. Jones. The advertising originates in the building and the labels are approved by the Label Department, but very little else is done in the building in connection with ice cream operations.

Fluid Milk Operations

The Fluid Milk operations are in charge of Mr. Comfort. Very little is done in the building in connection with these operations except advertising and approval of labels.

Departments Covering Several Divisions

We now come to a consideration of the various departments covering several Divisions.

Label Department.

The Label Department (R. 40-41) is located on the sixth floor of the building, and is in charge of Mr. Thompson and

a committee. The labels used on the Company's products must conform to the Federal Pure Food and Drug Act.

The contents of the labels are created and prepared in the building by the various Divisions. The proposed labels are then sent to the Label Department (R. 64) which checks their size and contents. They are then sent to the Legal Department for an opinion as to their legality. If they do not comply with the law, this department makes the necessary corrections so far as ingredients are concerned. No label may be used without the prior approval of this department. After approval, the labels are sent to printers all over the country. The finished labels are sent to factories and plants of the Company all over the nation and cross state lines. The labels are affixed to the products at the factories, and the products cross state lines.

The Export Department

The Export Department (R. 33-34) is located on the fifth floor of the building. It handles sales promotion in foreign countries such as Panama, Venezuela, Peru, and the United Kingdom. It promotes sales of all Borden products through advertising and through foreign brokers.

The advertising is prepared and directed in the building. The foreign orders come directly to the building and reach this department. The export department then prepares invoices and sends instructions to the various plants and factories to make shipment. *It has a direct teletype wire to plants and factories throughout the nation* (R. 26). The customers generally make payment directly to the Borden Building. In a few situations which are complicated by sterling regulations the orders are routed to a Canadian subsidiary for shipment and billing.

Real Estate Department

The Real Estate Department (R. 80) is located on the twenty-first floor of the building and is in charge of Mr. Bowman. It has charge of all property of the Borden

Company. It negotiates the acquisition of real estate and leases for factories and plants all over the nation. It disposes of non-profitable property on orders from the proper source.

The Safety Bureau

The Safety Bureau (R. 71-72) is located on the fourteenth floor of the building and is in charge of Mr. Quesnel. It develops and supervises safety systems for the protection of production employees at the Company's plants and factories all over the nation. It sends safety instructions across state lines. It works in cooperation with the Bureau of Insurance above described.

The Payroll Tabulation Department

The Payroll Tabulation Department (R. 53) is located on the ninth floor of the building. It prepares semi-monthly payroll checks for the higher paid workers such as plant executives, throughout the nation, and mails such checks to such employees.

Central Transcribing Bureau

The Central Transcribing Bureau (R. 68-69) is located on the twelfth floor of the building. The employees of the Company in the various departments, who have no secretaries, dictate to ediphone machines, and the records are sent up to this bureau for transcription.

Telephone and Switchboard

The telephone and switchboard operators (R. 26) handle all incoming and outgoing telephone calls. Calls to factories all over the nation clear through this switchboard. However, there are separate teletype machines located in the Manufacturing Department, Export Department and Special Products Division which have direct wires to factories all over the nation.

General Traffic Department

The General Traffic Department (R. 23-26) is located on the third floor of the building and is in charge of Mr. Hadley. The interstate activities of the company are so great that he has a staff of fifteen employees. This department studies routes and freight rates to get the cheapest and speediest mode of shipment. Its activities cover shipments of malted milk, caramels, Hemo, casein, milk sugar, mincemeat, condensed milk, evaporated milk and prescription foods. All of the factories producing such articles are located outside of New York State except those making mincemeat and milk sugar. This department receives instructions from the Sales Department of the Manufactured Products Division. It issues standing instructions to the factories with respect to regular customers. In case of a new customer, it gives instructions to the factory shipping the goods as to how the shipments should go forward and which carrier shall receive the shipment. The routing is shown on an invoice sent the factory. If factories change to new products, it issues new shipping instructions. The factories are located throughout the nation, and the shipping instructions cross state lines.

Stationery Department

The Stationery Department (R. 72-73) is located on the fourteenth floor and is in charge of Mr. Strasser.

The stationery of the company is written and designed in the Borden Building. It is then sent to the printing shop of the Borden Company, which is also in charge of Mr. Strasser but which is apparently located in another building. The print shop prints up the stationery.

This department receives requests for stationery from and supplies practically all of the affiliates, divisions, plants and factories of the entire Borden Company. It issues instructions to the print shop to ship the stationery. The stationery is sent across state lines.

Mailing Department

The Mailing Department (R. 41-43) is located on the sixth floor of the building and is in charge of Mr. Van Valkenburgh.

It handles incoming mail which is distributed by messengers to the various branches of the company. It also handles the outgoing mail of practically all the departments in the building. The outgoing mail is collected by messengers. The outgoing mail is addressed to factories, brokers and customers of the Company.

It occasionally receives incoming commodities, such as defective packages or products, from the factories, which are sent to the home office for examination for defects. It occasionally handles outgoing commodities, such as samples and replacements.

It has a messenger service to collect and distribute mail and inter-office communications. The messengers travel throughout the building by elevator or stairs.

Photostat and Photo-Offset Department

The Photostat and Photo-Offset Department (R. 55-58; R. 59-61; R. 98-101) is located on the tenth floor of the building and is also in charge of Mr. Strasser. It has about six employees. Its photostat equipment consists of a photostat machine and a dryer (R. 60). Its photo-offset equipment consists of a camera, a machine for transferring the negative to a plate, a developer for the plate, a printing machine and a paper cutter.

This department makes photostats of financial statements, correspondence, cancelled checks, etc. The photostats are sent across state lines.

This department also makes photo-offsets. This process is part photography and part printing and can make quantities speedily. It is used to prepare letters of instructions to factories regarding accounting methods, report forms, OPA rules, WPB regulations and priorities. It also produces copies of accounting reports to be sent to factories.

It also reproduces financial statements. It receives orders for photo-offset work from plants and factories of the company all over the nation, and fills the orders from the building. It mails large quantities across state lines to the factories.

Experimental Kitchen

The Experimental Kitchen (R. 78-79) was located on the third floor during the period in question and was in charge of Miss Belmanno. She prepared booklets of recipes for housewives in which Borden products would be used. The booklets were sent to Borden customers. The recipes also were published in newspapers and periodicals.

This concludes the detailed discussion of the organization of the Borden Company and of the activities of the Borden Company in the Borden Building. *The picture is clearly presented of a regular system of interstate production of goods, with the personnel in the Borden Building controlling, and directing each and every phase of that production, and of a great creative organization formulating ideas for the operation of all branches of the company.* The question in this case briefly is whether those activities constitute "production of goods for commerce" within the meaning of the Act. We now direct our attention to that question.

ARGUMENT

Introduction

The cause of action herein is a statutory one. Section 216(b) provides that any employer who violates the provisions of Section 207 of the Act shall be liable to the employees affected in the amount of their unpaid overtime compensation and in an additional equal amount as liquidated damages, and that an action to recover such liability may be maintained in any court of competent jurisdiction

by any one or more employees. The right of employees to recover in such a cause of action depends squarely on whether the defendant is an employer who has violated the provisions of Section 207 of the Act. We are not here concerned with any violation of Section 206 of the Act.

Section 207(a) provides that no employer shall employ any of his employees *"who is engaged in commerce or in the production of goods for commerce"* for a workweek longer than specified hours unless such employee receives compensation for his employment in excess of the hours specified at a rate not less than one and one-half times the regular rate at which he is employed.

The defendant in its answer admitted that it had employed service and maintenance men for workweeks in excess of the hours specified in the statute, and that it did not pay such employees, for employment in excess of the hours specified, at a rate not less than one and one-half times the regular rate at which they were employed (R. 9). It follows, therefore, that the defendant had violated the provisions of Section 207(a) of the Act and plaintiffs are entitled to recover under Section 216(b) if such service and maintenance employees were *"engaged in commerce or in the production of goods for commerce"* within the meaning of the Act.

We contend that under the particular facts of this case, respondents were clearly *"engaged in the production of goods for commerce"*, within the meaning of the Act.

We also contend that under the facts of this case, respondents were *"engaged in commerce"*, within the statutory meaning of that phrase.

POINT I

Respondents were "engaged in the production of goods for commerce" within the meaning of the Act.

Respondents respectfully submit that they were "engaged in the production of goods for commerce" within the meaning of the Act.

We have already set forth (p. 8 of this brief) the nature of the activities of the respondents. They are maintenance men of the Borden Building, to wit: porters, watchmen and elevator operators. They contribute and are essential to making the Borden Building safe, clean and habitable, and thus contribute to the continuity of the activities of the occupants of the Borden Building.

A. Respondents' activities constituted production of goods for commerce, if the occupants of the Borden Building were engaged in production of goods for commerce, in the Borden Building, within the meaning of the Act.

In Section 203(j) of the Act, the following language appears:

> "* * * for the purposes of this Chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed * * * in any * * * occupation necessary to the production thereof * * *."

It is now well settled that, if the *occupants* of a building are engaged in the production of goods for commerce within the meaning of the Act, the service and maintenance men, who make the building safe, clean and habitable for the use of such occupants and thus contribute to continuity of production, are employed in an occupation "necessary" to the production of goods for commerce; and that such service and maintenance men are deemed to have been "engaged in the production of goods".

Kirschbaum v. *Walling* (June, 1942), 316 U. S. 517;
Walton v. *Southern Package Corporation* (Jan., 1944), 320 U. S. 540;
Armour & Co. v. *Wantock* (Dec., 1944), 323 U. S. 126.

The statute covers employees "engaged in interstate commerce", and employees "engaged in the production of goods for interstate commerce". This Court has held that the latter phrase is broader than the former and includes employees not covered by the former.

McLeod v. *Threlkeld* (June, 1943), 319 U. S. 491;
Armour & Co. v. *Wantock* (Dec., 1944), 323 U. S. 126.

Care must be taken to distinguish a line of cases which denies recovery to service and maintenance employees of a building whose occupants are merely "engaged in interstate commerce" and not "engaged in the production of goods for commerce", in the building.

Stoike v. *First National Bank of the City of N. Y.* (Apr., 1943), 290 N. Y. 195 (certiorari denied);
Johnson v. *Dallas Downtown Development Co.* (C. C. A. 5) (Dec., 1942), 132 F. (2d) 287 (certiorari denied);
Cochran v. *Florida Nat. Bldg. Corp.* (C. C. A. 5) (Apr., 1943), 134 F. (2d) 615;
Tate v. *Empire Bldg. Corp.* (C. C. A. 6) (June, 1943), 135 F. (2d) 743 (certiorari denied);
Rosenberg v. *Semeria* (C. C. A. 9) (Aug., 1943), 137 F. (2d) 742 (certiorari denied);
Lofther v. *First Natl. Bank of Chicago* (C. C. A. 7) (Oct., 1943), 138 F. (2d) 299;
Convey v. *Omaha Natl. Bank* (C. C. A. 8) (Dec., 1943), 140 F. (2d) 640 (certiorari denied);
Rucker v. *First Natl. Bank of Miami* (C. C. A. 10) (Oct., 1943), 138 F. (2d) 699 (certiorari denied);
Johnson v. *Masonic Bldg. Co.* (C. C. A. 5) (Nov., 1943), 138 F. (2d) 817 (certiorari denied);

Blumenthal v. *Girard Trust Co.* (C. C. A. 3) (Apr., 1944), 141 F. (2d) 849;
Building Service Internatl. Union v. *Trenton Trust Co.* (C. C. A. 3) (May, 1944), 142 F. (2d) 257.

Petitioner, in its brief, contends (pp. 7, 10) that the crux of the case at bar is the meaning of the word "necessary" as used in Section 3(j) of the Act. We disagree with this statement of the issues in this case. In our opinion the *Kirschbaum*, *Walton* and *Armour* cases, *supra*, effectively settle the meaning of the word "necessary" as applied to the facts of this case.

We believe that the real question for this Court to pass upon is whether the activities of the *occupants* of the Borden Building constitute "production of goods for commerce", within the meaning of the Act. We discuss this in full under Point I B. The brief for petitioner completely overlooks a discussion of the activities of such occupants, and assumes that there was no "production of goods for commerce" in the Borden Building by its occupants. Certainly the Court below regarded that question as the crux of this case. In its opinion (R. 130) it said:

> "The case may, therefore, be further narrowed to whether the administrative agents and employees of a producing company are themselves 'engaged * * * in the production of goods for commerce'."

And, in a later case, the Court below said, in referring to the case at bar:

> "And we have recognized that persons who comprise management as well as those physically engaged in the manufacture of goods are so engaged in production as defined by the Act as to bring the service employees of the office building in which they are located under the coverage of the Act. *Borella* v. *Borden*, 145 F. (2d) (C. C. A. 2)."

Calius v. *10 East Fortieth Street Bldg., Inc.* (Dec., 1944), 146 F. (2d) 438.

However, even though we regard the meaning of the word "necessary", as applied to service and maintenance employees, as being well settled by this Court, we shall direct our attention to some of the arguments as to the meaning of "necessary" offered in petitioner's brief.

Petitioner has vainly groped for some theory to overcome the effect of the *Kirschbaum, Walton* and *Armour* cases, and has advanced a number of arguments, all of which are without merit.

Petitioner starts out with the assumption that the Court below decided the case at bar on the theory that the petitioner was not "engaged in the production of goods for commerce" in the Borden Building but was so engaged "elsewhere" and "in distant places" (see petitioner's brief, pp. 2, 3, 7, 11, 14, 15, 18). This assumption is clearly wrong. The case below was decided squarely on the ground that the activities in the Borden Building of the occupants of the Borden Building constituted "production of goods for interstate commerce".

Petitioner next extracts certain language from the *Kirschbaum* case, *supra*, as a test in applying the word "necessary" to the case at bar (pp. 6-7). It seizes upon the words "close and immediate tie" and "essential part" (p. 6), and alleges that the Court below failed to apply such a test in the case at bar. We respectfully submit that there is no magic in these quoted words. Actually the Court below did wholeheartedly accept the *Kirschbaum* case as a starting point for its reasoning (R. 131). By so doing it incorporated by reference all the reasoning in the *Kirschbaum* case and was not required to reiterate the specific language of that case. Moreover, the process of extracting words from prior decisions of the Court, without reading them in the light of the facts of the case from which they are taken, has recently been disapproved by this Court with a strong caution to counsel.

Armour & Co. v. *Wantock*, 323 U. S. 126.

This Court, in writing its opinion on the meaning of the word "necessary" in the *Armour* case, *supra*, did not once mention the phrase "close and immediate tie". Petitioner's contention that the Court below in the case at bar was in error in failing to apply the alleged test is entirely without merit.

Petitioner next attempts to limit the application of the *Kirschbaum*, *Walton* and *Armour* cases to buildings where goods are "physically produced" and where the service and maintenance employees make "a clear and convincing evidentiary demonstration" of the existence of a "close and immediate tie" between their work and production (p. 6). We respectfully submit that both of these limitations are without merit. In Point I (B) of our brief we shall discuss our concept of the word "production" and show that the activities of the Borden Company in the Borden Building constituted "production of goods for commerce". Certainly the Court below in the case at bar refused to recognize any requirement that goods must be "physically produced" in the building, for in a later case, referring to the *Borden* case, it said:

> "That no physical contact with the goods is necessary we pointed out in the *Borella* case."
>
> *Callus* v. *10 East Fortieth Street Bldg. Inc.* (Dec. 1944), 146 F. (2d) 438.

Moreover, this Court has already held that a physical process is not necessary to "production".

> *Kirschbaum* v. *Walling*, *supra*.

The evidentiary demonstration alleged by petitioner to be required, finds no warrant in the decisions of this Court. In the case at bar we have shown that the respondents contribute to continuity of production in the building by making the building safe, clean and habitable. We believe that that is all we are required to show under the *Kirschbaum*, *Walton* and *Armour* cases, *supra*.

Petitioner next attacks the decision of the Court below as being legislative rather than judicial interpretation (pp. 7-8). It extracts certain language from the *Western Union* case as alleged support for its position. There is no merit in the attack, and the language extracted when replaced into its context does not support petitioner's contention. The Court below performed a proper judicial function and its decision is within the fair range of judicial interpretation. It interpreted the Act by recourse to the underlying purpose of the Act. The language extracted from the *Western Union* case is proper when read in connection with the facts of that case. There the legislative history of the Act, and a refusal by Congress to enact expressly the meaning contended for by the Government gave color to the words used. But the language quoted when taken out of its context does not state a rule of interpretation. If the language were taken literally there would never be room for judicial interpretation. In our opinion, the Fair Labor Standards Act is remedial legislation and should be broadly interpreted. This Court has laid down a liberal standard for interpretation, as follows:

> "But these provisions, like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner."
>
> *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local No. 123, et al.* (1944), 321 U. S. 590.

Petitioner next attempts to place a limitation upon the meaning of the word "necessary" by referring to the implications of our dual system of government (pp. 8-10). Petitioner's argument is entirely without merit. Viewed from the implications of our dual system of government, the case at bar is correctly decided. Congress has said

that *intrastate* production destined for interstate commerce has a substantial effect on interstate commerce. As a consequence, Congress has forbidden substandard *intrastate* production. Certainly Congress also intended the Act to apply to cases, like the instant case, where the process of production is *interstate* and spread out over many states.

Petitioner attempts to interpret the word "necessary" by applying the standard of meaning of an ordinary man (pp. 10-11). It seems obvious that the judicial interpretation of that word by this Court with reference to building service and maintenance employees, should prevail over any standard of the ordinary man.

Moreover, the terms engaged "in the production of goods" or "in any * * * occupation necessary to the production" of goods are, in spite of petitioner's assertion to the contrary, highly technical terms involving legal knowledge and influenced by special statutory definitions. These terms should not be subject to the varying and inexperienced interpretations which would result from applying the standard of meaning of the "ordinary man".

At pages 11 and 12 of its brief, petitioner indulges in the dialectic reasoning which this Court specifically repudiated in the *Kirschbaum* case (at p. 526) when it quoted from *Santa Cruz* v. *Labor Board*, 303 U. S. 453, to the following effect:

> "And what is reasonably clear in a particular application is not to be overborne by the simple and familiar dialectic of suggesting doubtful and extreme cases."

At pages 12-13 of its brief, petitioner attempts to get some solace from the *Western Union* case, quotes certain language from that case dealing with the meaning of "handled" or "worked on", and concludes that the *respondents* are not engaged in production because they do not fit into the language quoted. Here petitioner's argument entirely misses the point. It is not necessary for building service and maintenance men to "handle" or "work on" goods in order to come within the coverage of the Act. It

is sufficient if they meet the tests laid down by the *Kirschbaum*, *Walton* and *Armour* cases, *supra*.

At various points in its brief petitioner attempts to establish a category of "office building" and alleges that service and maintenance men in such an "office building" are not covered by the Act (pp. 2, 3, 4, 11, 14, 15). There is no justification for such a category. In attempting to establish a category of "office buildings" the petitioner runs afoul of the language of the statute and of the reasoning of this Court in the *Kirschbaum* case, *supra*. In that case this Court warned that the phrase "engaged in the production of goods for commerce" cannot be construed by using abstract or rigid formulas or general propositions, that the Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations, and that the Court cannot escape an inquiry into the relationship of the particular employees to the production of goods for commerce. The petitioner's attempt to create a category of "office buildings" would wrongly stifle, at the threshold, the inquiry concerning what activities were carried on by the occupants of the particular building involved.

At page 13 of its brief petitioner cites a number of cases which, it alleges, support its position. In this it is plainly wrong. All of the cases cited deal with maintenance men of buildings whose occupants were merely "engaged in commerce" and who were not "engaged in the production of goods" in the particular building involved. We have already pointed out the importance of this distinction (*supra*, p. 33). The fact that most of the cases cited by petitioner were decided after the decision by this Court in the *Kirschbaum* case is without any significance in view of the distinction between the statutory language involved.

At pages 14-18 of its brief petitioner discusses four cases. In all of them the tenants were *elsewhere* engaged in production. They have no bearing on the instant case where the activities of the occupants of the building *in the building* constituted "production of goods for commerce."

At page 19 of its brief, petitioner attempts to attribute some significance to the denial of certiorari by this Court in a number of cases. This argument may be quickly discarded, since this Court has repeatedly warned the members of the bar that a denial of a writ of certiorari imports no expression of opinion upon the merits of the case.

It is apparent, therefore, that the definition of the word "necessary" as settled by this Court in the *Kirschbaum*, *Walton* and *Armour* cases, *supra*, squarely covers the respondents if the activities of the occupants of the Borden Building in the Borden Building constituted "production of goods for commerce" within the meaning of the Act. We now direct our attention to that subject, which we regard as the crux of this case.

B. The occupants of the Borden Building were "engaged in the production of goods for commerce", in said building, within the meaning of the Act.

We submit that the occupants of the Borden Building were *"engaged in the production of goods for commerce"*, in said building, within the meaning of the Act, and that the Court below correctly so held.

What do the words "production" and "goods", as used in the Act, mean?

Congress did not provide a special statutory definition for the precise word *"production"*. However, it did provide a special meaning in Section 203(j) for the word *"produced"* which we believe controls the meaning of the noun "production". Section 203(j) contains the following definition for "produced":

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

It is apparent that, in the special statutory definition, Congress incorporated the *colloquial* meanings of the words "produced", "handled" and "worked on".

The word "goods" has been given a statutory definition in Section 203(i) of the Act:

> "'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, • • • ."

This *statutory* definition of "goods" uses the words "goods", "wares", "products", "commodities", "merchandise" and "articles of commerce". These words must be given their *colloquial* meaning. In such *colloquial* meaning the words referred to relate to *tangible* objects.

In addition, the definition includes the phrase "or *subjects of commerce of any character*". This Court has very recently held that the word "subjects" as used in this identical Section 203(i) includes the physical expression of intangible ideas.

Western Union Tel. Co. v. *Lenroot* (1945), ... U. S. ....., 89 L. Ed. 289.

In that case this Court said:

> "That 'ideas, wishes, orders and intelligence' are 'subjects' of the interstate commerce in which telegraph companies engage has also been held. • • • We think telegraphic messages are clearly 'subjects of commerce' and hence that they are 'goods' under this Act. • • • "

We interpret this language as broad enough to include not only telegraph messages but also other physical expressions of intangible ideas.

In determining whether the occupants of the Borden Building were "engaged in the production of goods" for commerce we must consider the meaning of the word

"goods" in both its colloquial aspect (tangible objects) and its special statutory meaning of "subjects of commerce" (physical expression of intangible ideas).

We maintain, that, under either meaning of the word, "goods" are "produced" for commerce in the Borden Building; within the meaning of the Act.

Let us first consider "goods" as tangible objects, such as milk, cream cheese, or any one of the other numerous products of the Borden Company. What constitutes "production" in the colloquial meaning of the word, of such goods? We believe that the production process is basically composed of several elements, namely, brains, brawn, raw material and machinery. Each of these is a vital part of the process of production. Raw materials, machinery and brawn alone will not produce goods. There must also be the creative force of brain power, to determine when and how machinery and brawn should be applied to raw materials, and to determine when, where and how to acquire raw materials. In the usual case, all these elements are located in the same geographical place. The instant case is entirely different. Because of modern scientific methods of communication, such as teletype, it has been possible geographically to separate a large part of the element of brain power in production from the other elements necessary to production. This separation has been particularly advantageous in the case of the Borden Company, where many factories are under unitary ownership. The geographical separation of brain power from the other elements has made it possible to concentrate a large part of the production brain power at one spot, and thus to derive maximum efficiency in production. We call the attention of the Court particularly to the activities of the following groups of persons in the Borden Building:

The Manufacturing Department of the Manufactured Goods Division (pp. 13-14 herein);

The Accounting Department of the Manufactured Goods Division (pp. 20-22 herein);

The Purchasing Department (p. 14 herein).

The Manufacturing Department has constant and instantaneous contact with the factories and determines what shall be produced, and when, and how. The Accounting Department of the Manufactured Products Division (as distinguished from the General Accounting Department) has charge of the detailed production records without which the production brain power cannot act intelligently. The sub-departments of the Accounting Department perform functions which in the usual case are performed at a factory. The physical separation of these functions from the factories and their transfer to the Borden Building cannot change their character as production activities. The Purchasing Department purchases substantially all the major supplies, machinery and raw materials needed by the plants and factories for the production of the Borden products.

The conclusion is inescapable that the activities in the Borden Building being an important *element* in the production of the Borden products, constitute "production" in the Borden Building of such goods within the meaning of the Act. This conclusion is fortified by the language of the Act in Section 203(j) where Congress has stated that an employee engaging in any *"process necessary"* to the production of goods constitutes production of goods. This Court has held that an essential preliminary step in the production process constitutes "production".

Warren Bradshaw Drilling Co. v. *Hall* (Nov., 1942), 317 U. S. 88.

In that case oil drillers who drilled only to a specified depth short of oil were held to be engaged in the production of oil. This Court held that the drilling was a necessary part of the productive process to which it was intimately related. Moreover, this Court has already held that a *physical* process is not necessary to production.

Kirschbaum v. *Walling, supra.*

In the *Western Union* case, *supra,* this Court, in discussing the meaning of "produce", "handle" and "work on", said:

> "• • • But the statute, while defining 'produced' to mean 'handled' or 'worked on' has not defined 'handled' or 'worked on'. These are terms of ordinary speech and mean what they mean in ordinary intercourse in this context. They serve a useful purpose when read to relate to all steps, whether manufacture or not, which lead to readiness for putting goods into the stream of commerce. One who packages a product, or bottles a liquid, or labels, or performs any number of tasks incidental to preparing for shipment might otherwise escape the Act, for in a sense he neither manufactures, produces, or mines the goods. *We are clear that 'handled' or 'worked on' includes every kind of incidental operation preparatory to putting goods into the stream of commerce.*" (Italics supplied.)

Certainly, the activities of the Borden Company in the Borden Building were operations preparatory to putting the tangible goods into the stream of commerce and therefore constituted "production" of such "goods".

Next let us consider "goods" in its meaning as the physical expression of an intangible idea. In the *Western Union Company* case, as we have already seen, this Court held that a telegraph message was "goods" and that "handling" or "working on" the "goods" constituted "producing" the "goods". The exact limits of this doctrine have not yet been defined, but whatever its ultimate limits, we assert that it should be applied to the facts of this case. When so applied there clearly is "production" of "goods" for commerce, in the Borden Building. The instant case meets the test laid down by the majority opinion in the *Western Union* case because here the ideas themselves are *created* in the Borden Building, while the telegraph company merely handled and worked on ideas produced by the sender of the message. The record in our case is replete with instances where ideas of all kinds are created in the building, reduced to physical expression in the building, worked on in the building, and transmitted and communi-

cated across state lines. To state all of the examples would require reiteration of large parts of the activities of the Borden Company. We here merely call the attention of the Court to a few instances:

The advertising ideas created by the General Advertising Department;

The legal opinions written by the Legal Department;

The production ideas created by the Manufacturing Department;

The advertising ideas created by the Sales Department of the Manufactured Products Division;

The Credit Reports created by the Credit Department;

The accounting ideas created by the Accounting Department of the Manufactured Products Division;

The production and advertising ideas created by the Casein Division, the National Milk Sugar Division, and the Special Products Division;

The purchasing ideas created in the Purchasing Department;

The ideas for labels created and prepared in the building and checked over by the Label Department and the Legal Department;

The advertising and other sales promotion ideas created by the Export Department;

The safety ideas created by the Safety Bureau;

The traffic ideas created in the Traffic Department;

The operations of the Photostat and Photo-Offset Department in changing the physical form of expression of the ideas;

The operations of the teletype system in the Manufacturing, Export and Special Products Division in changing the physical form of the expression of the ideas.

It is clear that important ideas are created and worked on in the building and transmitted across state lines. This Court should hold that the doctrine of the *Western Union*

case applies to the instant case, and that there is "production of goods for commerce" by the Borden Company in the Borden Building.

POINT II

Respondents were "engaged in interstate commerce" within the meaning of the act.

We believe that the respondents in this case were also "engaged in interstate commerce" within the meaning of the Act. Concededly, the Borden Building is the center of a tremendous amount of interstate activity. Certainly the elevators in the building are indispensable to the conduct of interstate commerce by the Borden Company there. The porters who clean the quarters where the occupants carry on interstate commerce (R. 83-86), and the watchmen who safeguard the premises and the property of the occupants, are also so closely connected with operations in interstate commerce as to be a part thereof.

The defendant is engaged in interstate commerce at the Borden Building (R. 120) to such an extent that the activities in the Borden Building make that building an *instrumentality* of interstate commerce in the same manner that a bridge in interstate commerce is an instrumentality thereof. It has been held that employees engaged in maintaining instrumentalities of interstate commerce are covered by the Act.

Overstreet v. *North Shore Corp.* (Feb., 1943), 318 U. S. 125 (drawbridge).

The respondents herein are therefore "engaged in interstate commerce".

Certainly it is possible for maintenance men in a building to be so closely connected with the operations of interstate commerce that the maintenance men may be said to be "engaged in interstate commerce". Each case must be decided on its own facts.

Burton v. *Zimmerman* (1942), 131 F. (2d) 377.

CONCLUSION

The testimony in this case establishes that the various plants of the Borden Company throughout the country are parts of one vast national production system, of which another essential part is physically housed in and functions at the Borden Building. Here we have what we respectfully submit is the unusual situation: a complex interstate production system, the operation of which depends upon operations in the Borden Building. From this building, the Company's far-flung activities are not merely generally supervised, but are actually controlled in minute detail. These activities, centralized in the Borden Building, are part of, control and motivate production and manufacture in plants throughout the country, as well as all other activities of the Company.

If the activities now being carried on at the Borden Building were to be discontinued, the necessary flow of production activities would abruptly halt and the Company's interstate production system would collapse, in the same cause and effect relationship as if labor at the plants ceased working or if the machinery at the plants were suddenly dismantled or destroyed.

The decision below is correct. The essence of this case is whether physical contact with the raw material or finished goods on the part of the occupants of a building is essential to "production". The Court below held in the negative and we believe that decision is correct.

Viewed from the point of economic and social policy, the decision of the Court below is sound. One of the purposes of the Act is to spread employment.

Overnight Motor Transportation Co., Inc. v. *Missel* (1942), 316 U. S. 572.

The decision of the Court below contributes to the spreading of employment and thereby will aid in solving the post-war problem of providing jobs for returning war veterans.

The judgment in favor of respondents should be affirmed.

Respectfully submitted,

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